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Supreme Court, U.S.
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No. 97-144 JUL 18 1997

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STEVE PEARSON, *Petitioner*,

v.

GARY DALE HINES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS
Senior Assistant Attorney General
BRUCE M. SLAVIN
Supervising Deputy Attorney General
CATHERINE A. McBRIEN
Deputy Attorney General
Counsel of Record
50 Fremont St., Room 300
San Francisco, CA 94105
Telephone: (415) 356-6040
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Should this Court resolve a split among the circuits over whether a trivial and constitutionally insignificant everyday occurrence in prison becomes actionable simply because a prisoner claims the act was the result of retaliatory motive?

2. Does the "some evidence" standard established in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985), apply to review conduct of an officer who issues a disciplinary charge that is allegedly false and retaliatory?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steve Pearson, a California correctional officer, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals (Appendix A) is reported at 108 F.3d 265 (9th Cir. 1997).

JURISDICTION

The court of appeals filed its opinion on March 10, 1997. (Appendix A.) Pearson's petition for rehearing and suggestion for *en banc* review was denied on April 23, 1997. (Appendix B.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

QUESTIONS PRESENTED

1. Should this Court resolve a split among the circuits over whether a trivial and constitutionally insignificant everyday occurrence in prison becomes actionable simply because a prisoner claims the act was the result of retaliatory motive?

2. Does the "some evidence" standard established in *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. 445 (1985), apply to review conduct of an officer who issues a disciplinary charge that is allegedly false and retaliatory?

STATEMENT OF THE CASE

On January 19, 1992, Correctional Officer Pearson was escorting inmate Hines back to his cell after Hines took a shower. Pearson claimed Hines threatened him and violated a prison rule when he stopped walking during the escort. Hines denied it. *Hines v. Gomez*, 108 F.3d at 267.

Pearson filed disciplinary charges against Hines. A hearing officer found Hines guilty, ordered Hines confined to quarters for ten days, and required Hines to send his television outside the institution. *Hines v. Gomez*, 108 F.3d at 269.

Thereafter, Hines filed a prison grievance claiming that Pearson used excessive force and threatened him during the incident. *Hines v. Gomez*, 108 F.3d at 269.

Hines later filed a civil rights action alleging that the disciplinary charges were falsified in retaliation for his use of the prison grievance process.

A jury found that the charges filed by Officer Pearson were false and in retaliation for Hines' use of the prison administrative appeal process. The jury also found that Lt. Szmarciaz, the disciplinary hearing officer, retaliated against Hines by finding him guilty. *Hines*, 108 F.3d at 267. The jury awarded Hines $100.00 compensatory damages and $1,000.00 punitive damages against Pearson, and $200.00 compensatory damages and $1,000.00 punitive damages against Szmarciaz. *Hines*, 108 F.3d at 267, n.2.

Defendants Pearson and Szmarciaz each sought judgment as a matter of law on the basis that there was no evidence Pearson was aware of Hines' use of the prison administrative appeal process, and the jury was allowed to impermissibly re-weigh the evidence in support of the disciplinary violation contrary to the "some evidence" standard set forth in *Superintendent v. Hill*, 472 U.S. 455. *Hines*, 108 F.3d at 267.

Judgment as a matter of law was entered in favor of Szmarciaz because the disciplinary charges were supported by "some evidence." However, the district court denied Pearson's motion, holding that *Hill*'s "some evidence" standard does not apply to the charging officer. *Hines*, 108 F.3d at 267-68.

Pearson appealed, contending that his conduct as the charging officer should also have been reviewed under the "some evidence" standard. Pearson also argued that the loss of Hines' television and his confinement to quarters for ten days was not a sufficiently significant deprivation to form the basis of a cognizable retaliation claim. *Hines*, 108 F.3d at 267.

The Ninth Circuit ruled that **other** defendants' knowledge of Hines' reputation as a "whiner," together

with the fact that Hines filed previous unspecified grievances and told Pearson he was "going to grievance him," allowed the jury to infer that Pearson was aware of Hines' use of the grievance process and acted with a retaliatory motive. The Ninth Circuit rejected Pearson's proposed rule that an inmate be required to establish an objectively significant injury to state a cognizable retaliation claim. The court also refused to apply the "some evidence" standard to Pearson as the charging officer. *Hines*, 108 F.3d at 268.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD SET FORTH A RULE THAT ONLY SIGNIFICANT DEPRIVATIONS MAY FORM THE BASIS FOR A CONSTITUTIONAL RETALIATION CLAIM.

In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285 (1977), this Court discussed the difficult questions of causation posed in retaliation cases, and recognized that a complaining party should not be put "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285. The current state of prisoner retaliation law flouts the rationale articulated in *Mt. Healthy* because prisoners can circumvent the accepted standards of review that govern prisoner constitutional claims by simply alleging that everyday hardships incident to prison life occur because of retaliation.

In *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), the Ninth Circuit makes clear that in order to avoid the special considerations that apply to constitutional challenges brought by state prisoners, all a prisoner has to

do is allege that prison action was taken against him because he intended to complain about prison conditions. The *Hines* decision stands as a roadmap for state prisoners who seek to avoid the standards and competing interests that apply in challenges to the prison disciplinary process.

Although this Court established long ago that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of legitimate policies and goals of the corrections system," *Pell v. Procunier*, 417 U.S. 817, 822 (1974), now the Ninth Circuit and other courts say that, when it comes to retaliation claims against prison officers, institutional interests take a back seat, and the potential "chilling" effect of any retaliatory action, no matter how inconsequential, is a sufficient injury. *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995). The constitutional balance struck by this Court in assessing prisoner First Amendment claims (*Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Pell v. Procunier*, 417 U.S. 817) and reviewing the imposition of prisoner discipline (*Wolff v. McDonnell*, 418 U.S. 539 (1974); *Superintendent v. Hill*, 472 U.S. 445 (1985)) is skewed when the claim bears the label of "retaliation."

The magic incantation of retaliation is sufficient to trigger constitutional scrutiny of trivial, insignificant and commonplace incidents of prison life. Federal courts throughout the country are holding actionable claims in which the most trivial deprivations receive constitutional scrutiny because retaliation is alleged. *Kent v. Johnson*, 821 F.2d 1220, 1228 (6th Cir. 1987) [female prison guards' observation of male inmate in shower]; *Hall v. Sutton*, 755 F.2d 786, 788 (11th Cir. 1985) [confiscation of a pair of tennis shoes]; *Wiideman v. Angelone*, 848 F.Supp. 136, 140 (D. Nev. 1994) [confiscation of typewriter]; *Rodriguez v.*

Kincheloe, 763 F.Supp. 463, 472 (E.D. Wash. 1991), *cert. denied*, 507 U.S. 933 (1993) *reh'g denied*, 507 U.S. 142 (1993)) [confiscation of an Ace bandage].

The procedural and substantive protections afforded state prisoners under the due process clause have been extended only to those serious disciplinary proceedings that involve significant penalties. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Superintendent, Mass. Corr. Institution v. Hill*, 472 U.S. at 454. A prisoner's claimed denial of access to the courts is not actionable unless the prisoner has suffered "actual harm." *See Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 2174, 2180 (1996). Prison practices and regulations challenged on First Amendment grounds will survive scrutiny if they are reasonably related to the advancement of valid penological interests. *See Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). Only deliberate indifference to a "**serious** medical need" is cognizable. *See Estelle v. Gamble*, 429 U.S. 97, 105 (1975) emphasis added. An inmate must establish a significant, objective deprivation to state a cognizable claim for violation of the Eighth Amendment. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991). A *de minimis* use of force is insufficient to state an Eighth Amendment violation. *See Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992). Prison regulations do not give rise to a constitutionally protected liberty interest unless a prisoner has suffered an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293, 2300 (1995). However, all the watchwords employed by this Court to limit the justiciability of prisoner claims to significant events have been rendered meaningless to the shibboleth of "retaliation."

In *Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293 (1995) this Court expressly repudiated lower court cases in which inmates relied on prison regulations to claim protected liberty interests in participating in a boot camp program, *Klos v. Haskell*, 48 F.3d 81 (2nd Cir. 1995), in receiving a tray lunch rather than a sack lunch, *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990), in receiving a paperback dictionary, *Spruytte v. Walters*, 753 F.2d 498, 506-508 (6th Cir. 1985), and in freedom from transfer to a smaller cell without outlets for televisions. *Lyon v. Farrier*, 727 F.2d 766, 768-69 (8th Cir. 1984), *cert. denied* 469 U.S. 839 (1984). *Id.* at 2300.

The rationale expressed in *Sandin* reflects the common thread through twenty years of this Court's jurisprudence in prison cases to limit prisoner lawsuits based upon insignificant deprivations. The Ninth Circuit's decision in this case, and developing retaliation law in other circuits, conflicts with *Sandin*'s principles by permitting retaliation claims to proceed on the basis of even less significant deprivations than those found constitutionally insufficient in *Sandin*.

Allowing any deprivation, no matter how inconsequential, to form the basis of a retaliation claim magnifies the potential for abuse and would "'[t]rivialize the First Amendment . . . .' [Citation omitted.]" *Crawford-El v. Britton*, 93 F.3d 813, 826, *cert. granted*, 138 L.Ed.2d 210 (U.S. 1997). The Ninth Circuit's decision in this case does just that.

The Ninth Circuit's holding conflicts with holdings of the Fourth, Eighth and District of Columbia Circuits. In the Fourth Circuit, even admittedly retaliatory conduct is not actionable absent a "showing of adversity." *See, e.g., ACLU of Maryland v. Wicomico County Md.*, 999 F.2d 780, 785 (4th Cir. 1993). In *Crawford-El v. Britton*, 93 F.3d 813

(D.C. Cir. 1996), the Circuit of the District of Columbia held that a *de minimis* injury is insufficient to form the basis of a retaliation claim and that the injury asserted must be sufficiently adverse that it "would chill or silence a 'person of ordinary firmness' from future First Amendment activities." *Id.* at 826. The Eighth Circuit does not permit a claim for retaliation "when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform. Any other rule would allow a prisoner to openly flout prison rules after filing a grievance." *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990).

The result of the Ninth Circuit's departure from this Court's caveat in *Mt. Healthy* is that the potential "chilling effect" of retaliatory action is given paramount consideration in disregard of the incredibly complex job of managing America's prisons. This Court's recognition of the complexity of prison administration has led it to remark that courts should not be the "front line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier v. Martinez*, 416 U.S. 396, 405, n.9 (1974).[1] Yet the Ninth Circuit's ruling in *Hines* shows that is precisely what the federal courts have become.

The concern expressed by the courts that align with the Ninth Circuit over the "chilling effect" on a prisoner's First Amendment rights is not reflected in the experience of the states. For example, in 1994, the California state inmate grievance process resolved 36,047 grievances.

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1. *Procunier*'s First Amendment standard of review to outgoing correspondence, which required a "least restrictive alternative" method of analysis, was overruled by this Court in *Thornburgh v. Abbott*, 490 U.S. 401 which requires only that a regulation be reasonably related to a legitimate penological interest. *Id.* at 413-14.

Washington state satisfactorily resolved 87% of the 20,767 grievances received that same year. While in the Ninth Circuit in 1994, prisoner cases represented 25% of the civil filings in the district courts, and 21% of the civil cases filed in the court of appeals. *See* Task Force of Prisoner Remedy Procedures, *Effective Prisoner Remedy Procedures, Report to the Judicial Council of the Ninth Circuit*, August 1995, pages 2-12.

Given the enormous volume of prisoner lawsuits overwhelming the federal judiciary, it is time for this Court to announce a rule that "reflects a healthy sense of realism," and defines the limits of actionable prisoner retaliation claims. *Procunier v. Martinez*, 416 U.S. at 405. Retaliation claims should not be exalted above all constitutional claims brought by prison inmates, including those brought directly for an infringement of the First Amendment.

II.

THE "SOME EVIDENCE" STANDARD SHOULD APPLY TO ALL PRISON OFFICIALS WHO TAKE PART IN THE PRISON DISCIPLINARY PROCESS.

In affirming the verdict against Correctional Officer Pearson, the Ninth Circuit refused to apply the "some evidence" standard set forth in *Superintendent v. Hill*, 472 U.S. 445 (1985) to the officer who **files** disciplinary charges against an inmate.[2/]

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2. Based on the Ninth Circuit's prior holding in *Barnett v. Centoni*, 31 F.3d 814 (9th Cir. 1985), in which the "some evidence" standard was used to review a claim of retaliatory **discipline**, as opposed to a "false retaliatory accusation," the panel in this case was constrained to apply the "some evidence" standard to the hearing

The Ninth Circuit's ruling is flatly inconsistent with the rationale of *Hill*, which forbade courts from second-guessing and re-litigating prison disciplinary decisions and stated that "[r]equiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests." *Hill*, 472 U.S. at 454-55.

In declining to apply the "some evidence" standard to the officer who **files** the disciplinary charges, but conceding its application to the hearing officer who **adjudicates** the charges, the Ninth Circuit set up an entirely artificial construct in which the disciplinary charges are distinguished from, and subject to, a different analysis than the actual punishment imposed.

Based on the Ninth Circuit's analysis, the inmate has two separate interests: freedom from false accusations and freedom from arbitrary discipline. The effect of the court's ruling, however, is to review the freedom from arbitrary **discipline** under the deferential "some evidence" standard, while the freedom from false accusation is more closely scrutinized. This is the equivalent of applying a more demanding standard of review to arrest charges than that applied to the conviction resulting from the arrest. Since the disciplinary charges are inextricably linked to the discipline imposed, there is no logical basis to apply different standards of review depending upon a prison official's role in the disciplinary proceedings.

Just as a defendant's denial of guilt in a criminal case would provide absolutely no basis for a reviewing court to conclude that the defendant's conviction was not

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officer who adjudicated the disciplinary charges filed by Officer Pearson. *Hines*, 108 F.3d at 268.

supported by substantial evidence, an inmate's denial of guilt in prison disciplinary proceedings should likewise provide no basis to re-weigh the evidence de novo. *Viens v. Daniels*, 817 F.2d 1328, 1335 (7th Cir. 1989); *U.S. v. Manos*, 848 F.2d 1427, 1436 (7th Cir. 1988), *reh'g denied* (1988).

Review by this Court is necessary because the circuits are divided on the application of the "some evidence" standard. The Seventh and Eighth Circuits apply *Hill*'s "some evidence" standard to claims of false and retaliatory discipline. *McKinney v. Meese*, 831 F.2d 728, 733 (7th Cir. 1987); *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2584 (1995).

The Second and Ninth Circuits, however, have refused to apply the standard to retaliation claims challenging disciplinary charges. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996); *Hines v. Pearson*, 108 F.3d at 268.

Even the Seventh Circuit, which does not require a significant, objective deprivation in order to state a retaliation claim, *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995), does apply the "some evidence" standard when reviewing a claim of retaliatory discipline. *McKinney v. Meese*, 831 F.2d 728, 733 (7th Cir. 1987).

In refusing to require a significant, objective deprivation, or to apply the "some evidence" standard, the Ninth Circuit stands alone in its deference not to prison officials, but to inmates who may bring a claim in federal court for the most trivial deprivations based on a mere allegation of a retaliatory motive. The Ninth Circuit has flouted this Court's repeated admonitions emphasizing the

importance of affording prison officials the deference and flexibility necessary to manage the volatile environment of a prison. *Sandin*, 115 S.Ct. at 2299; *Lewis v. Casey*, 116 S.Ct. at 2185. Applying the "some evidence" standard to claims of retaliatory disciplinary charges and requiring inmates to establish a significant, objective deprivation would further legitimate penological interests in managing a prison that is not subjected to abusive litigation by inmates and unwarranted second-guessing by courts and juries.

III.

THIS CASE PRESENTS SIMILAR AND COMPLEMENTARY QUESTIONS TO THOSE BEFORE THE COURT IN *CRAWFORD-EL v. BRITTON*, 93 F.3d 813 (D.C. Cir. 1996), *CERT. GRANTED*, 138 L.Ed.2d 210 (U.S. 1997).

In *Crawford-El*, this Court granted certiorari to review a retaliation claim in light of a qualified immunity defense. Accepting review in this case would provide the Court with an opportunity to address the standards that should govern retaliation cases and furnish much-needed uniformity in this area of the law. The two cases are complementary. The Court's determination of the issue in this case could furnish the rule to be applied in cases like *Crawford-El* when considering qualified immunity in the context of a retaliation claim. This Court's decision in *Crawford-El* could warrant reconsideration of this case by the Ninth Circuit in light of the rule that may be announced in *Crawford-El*.

CONCLUSION

The petition for writ of certiorari should be granted to review the decision of the Ninth Circuit in *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997).

Dated: July 16, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
PETER J. SIGGINS
Senior Assistant Attorney General
BRUCE M. SLAVIN
Supervising Deputy Attorney General
CATHERINE A. McBRIEN
Deputy Attorney General
Counsel of Record
50 Fremont Street, Room 300
San Francisco, CA 94105
(415) 356-6040

Counsel for Petitioner

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY DALE HINES,
Plaintiff-Appellees-Cross-Appellant,

v.

JAMES GOMEZ, Director,
Defendant,
and

S. PEARSON,
Defendant-Appellant-Cross-Appellee.

Nos. 95-17259
95-17260

D.C. No.
CV-92-00120-WDB

OPINION

Appeals from the United States District Court
for the Northern District of California
Wayne D. Brazil, Magistrate Judge, Presiding

Argued and Submitted
January 15, 1997--San Francisco, California

Filed March 7, 1997

Before: Donald P. Lay,* Alfred T. Goodwin and
Mary M. Schroeder, Circuit Judges.

Opinion by Judge Lay

* Honorable Donald P. Lay, Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed a judgment of the district court. The court held that an inmate's reputation as a complainer and his threat to file a grievance supports a jury finding that a prison guard filed a disciplinary report in retaliation for the inmate's use of the grievance system.

Appellant prison guard S. Pearson filed a report against appellee death row inmate Gary Hines alleging that Hines stopped while being escorted in violation of prison rules and that Hines threatened him. Hines filed a civil rights suit against Pearson, alleging that Pearson's charge was false and in retaliation for his past use of the grievance system.

At trial, other guards testified as to Hines's reputation for "complaining" and "whining." There was evidence that on the morning of the incident Hines told Pearson he was going to grievance him. A jury returned a verdict for Hines, expressly rejecting Pearson's proffered reason for the disciplinary charge. A magistrate judge denied Pearson's motion for judgment as a matter of law, finding that although there was no direct evidence that Pearson harbored a retaliatory animus towards Hines based on his prolific use of the prison grievance system, there was sufficient circumstantial evidence from which a jury rationally could have found that Pearson's conduct was driven by a retaliatory motive.

Pearson appealed, arguing that there was not substantial evidence supporting the jury's finding of retaliatory motive because there was no proof that he knew of Hines's use of the grievance system. He also contended that the trial court erred by failing to apply the

"some evidence" standard of review and that Hines's alleged injuries were not sufficient bases to sustain his retaliation claim.

[1] The evidence supported the inference that Pearson knew of Hines's use of the grievance system. The jury's rejection of Pearson's reason for the disciplinary charge, along with the circumstantial evidence, warranted the jury's finding that Pearson filed the report in retaliation for Hines's use of the grievance system.

[2] The Supreme Court has held that if there is even "some evidence" to support a prison's disciplinary decision, the requirements of due process are satisfied. [3] The distinction between the institutional interests in a prison board's disciplinary decision and a guard's accusation of wrongdoing removes cases such as this from that authority. A prison board bases its disciplinary decision on its own credibility determinations and on independent evidence. The board generally affords the inmate notice of the charges, an opportunity to call witnesses, and a written statement outlining evidence relied on and reasons for the disciplinary action. In contrast, there are no procedural safeguards protecting a prisoner from false retaliatory accusations. A guard may file an accusation solely on his own word.

[4] The correctional officer's accusations were not entitled to the "some evidence" standard of review that is afforded disciplinary administrative decisions.

[5] Prisoners may base retaliation claims on harms that would not raise due process concerns. [6] Hines alleged that Pearson's false charge infringed his First Amendment right to file prison grievances. His failure to demonstrate a more substantial injury did not nullify his retaliation claim.

COUNSEL

Catherine A. McBrien, Deputy Attorney General, San Francisco, California, for the defendant-appellant-cross-appellee.

Diane J. Mason, San Francisco, California, for the plaintiff-appellee-cross-appellant.

OPINION

LAY, Circuit Judge:

Gary Dale Hines, a death row inmate, brought this action under 42 U.S.C. § 1983 against various prison officials employed by the San Quentin State Prison in California. Hines alleges, *inter alia*, that Steven Pearson, a prison guard, falsely charged him with a rule violation and that Stephen Szmaciarz, a hearing officer, falsely found Hines guilty of the infraction. Hines maintains that both officials acted in retaliation for his prior use of the prison grievance system.[1] The parties agreed to try the case before a magistrate judge. A jury found for Hines against Pearson and Szmaciarz.[2] The magistrate judge then granted Szmaciarz's post verdict motion for judgment as a matter of law but denied Pearson's post trial motions. Pearson appeals the magistrate judge's post trial decision and Hines cross-appeals the grant of Szmaciarz's motion. We affirm.

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1. While Hines also sued other correctional officers, only the claims against Pearson and Szmaciarz are involved in this appeal.

2. The jury awarded Hines $100 compensatory damages and $1,000 punitive damages against Pearson. Hines was awarded $200 in compensatory damages and $1,000 punitive damages against Szmaciarz.

BACKGROUND

On January 19, 1992, Officer Pearson was escorting Hines back to his cell after Hines had his morning shower. Hines wore only his boxer shorts with his hands cuffed behind his back. Pearson was holding the very short chain that connected the cuffs. Nonetheless, Pearson reported Hines stopped to receive some unidentified object from some other, unidentified inmate. Pearson also reported that Hines threatened him. At San Quentin, stopping while being escorted violates a prison rule. Hines denies he attempted to stop. Hines later filed a prison appeal alleging Pearson used excessive force and threatened him during the January 19 incident.

Hines brought this action under § 1983 alleging that Pearson's charge was false and in retaliation for his use of the grievance system. The jury returned a verdict for Hines against Pearson. The magistrate judge denied Pearson's motion for judgment as a matter of law and motion for a new trial. The magistrate judge found that although "there was no *direct* evidence that Officer Pearson harbored a retaliatory animus towards plaintiff based on plaintiff's prolific use of the prison grievance system, there was sufficient circumstantial evidence from which a jury rationally could have found that Pearson's conduct was driven by a retaliatory motive." *Hines v. Gomez*, No. CV 92-0120, slip op. at 12 (N.D. Cal. Aug. 18, 1995) (order denying in part post-trial motions) (emphasis in original).

DISCUSSION

This court reviews civil jury verdicts to determine whether the verdict is supported by substantial evidence. *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992).

I. Pearson Appeal

Pearson's appeal raises several issues. We must decide whether there was substantial evidence that Pearson charged Hines in retaliation for Hines' use of the prison grievance process. Pearson also claims the trial court erred by failing to apply the "some evidence" standard of review to Pearson, and that Hines' alleged injuries are not sufficient bases to sustain his retaliation claim.

A. Substantial Evidence of Pearson's Retaliation

Pearson maintains there was no evidentiary basis supporting the jury's finding that he filed the disciplinary report with a retaliatory motive. Hines' retaliation claim must rest on proof that Pearson filed the disciplinary action against him in retaliation for Hines' exercise of his constitutional rights and that the retaliatory action advanced no legitimate penological interest. *See Barnett v. Centoni*, 31 F.3d 813, 815-16 (1995) (citing *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985)). Pearson challenges whether the evidence satisfies the first prong, particularly contending there was no proof that he even knew of Hines' use of the prison grievance system.

[1] We agree with the magistrate judge's appraisal that reasonable inferences from the evidence support the jury's verdict. Officials and guards other than Pearson testified of Hines' reputation for "complaining" or "whining." Hines had in fact filed many grievances. More specifically, there was evidence that on the morning of the incident giving rise to this suit Hines expressly informed Pearson he was "going to grievance him." This evidence amply supports the inference that Pearson knew, at least to some extent, of Hines' use of the grievance system. Pearson does not contest the jury's determination that he falsely accused Hines of attempting to receive an object

from another inmate. The express rejection of Pearson's proffered reason for the disciplinary charge, the circumstantial evidence of Hines' reputation within the prison as a complainer and a whiner, and evidence that on the same morning of the incident in question Hines threatened Pearson with a grievance, warrants the jury's finding that Pearson filed the disciplinary report in retaliation for Hines' use of the grievance system.

B. "Some Evidence" Standard to Pearson

Pearson argues the district court should have applied the deferential "some evidence" standard of review in analyzing his accusation that Hines violated a disciplinary rule. In *Superintendent v. Hill*, 472 U.S. 445 (1985), the Supreme Court considered the deference courts must afford a prison disciplinary board's finding that a prisoner committed an infraction where the punishment is the loss of good time credits. *Hill* held that if there is even "some evidence" to support the prison's disciplinary decision, the requirements of due process are satisfied. 472 U.S. at 455.

The question becomes whether the deferential *Hill* standard of review should apply not only to a prison disciplinary board's finding of a rule violation, but also to a prison guard's initial accusation of a rule violation where the guard's accusation itself allegedly is false and retaliatory. We think not.

The *Hill* Court sought to strike the proper balance between a prisoner's right to rational decisions that affect his incarceration period and the prison's interest in maintaining institutional safety through efficient discipline of prisoners who violate prison rules. In concluding that existence of "some evidence" sufficiently accommodates the competing interests, the Court reasoned that "[r]equiring a modicum of evidence to support a decision

to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens." 472 U.S. at 455. Because "[p]rison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances," the Due Process Clause does not mandate that courts abrogate prison administrators' decisions "that have some basis in fact." *Id.* at 456.

[3] The distinction between the institutional interests in a prison board's disciplinary decision and a guard's accusation of wrongdoing removes cases such as this from Hill's authority. A prison board will base its disciplinary decision on its own credibility determinations and on independent evidence provided to the board. The board generally will afford the accused inmate advance written notice of the charges, an opportunity to call witnesses provided there is no conflict with institutional safety and correctional goals, and a written statement outlining the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974). The *Hill* Court expressly considered these due process protections when it weighed the prisoner's interests against those of the institution. *See Hill*, 472 U.S. at 454-55. In contrast, there are no procedural safeguards protecting a prisoner from false retaliatory accusations; a guard may, and often does, file an accusation solely on his own word, making his mere accusation the only "modicum of evidence."

Pearson argues that this court's decision in *Barnett* mandates that we apply the deferential *Hill* standard to his allegation against Hines. We disagree. *Barnett* does not extend the "some evidence" standard to immunize retaliatory accusations by prison guards. *Barnett* focused

on a prison classification committee decision to discipline the prisoner. *Barnett*, 31 F.3d at 814.

[4] We hold that where a prisoner alleges a correctional officer has falsely accused him of violating a prison rule in retaliation for the prisoner's exercise of his constitutional rights, the correctional officer's accusation is not entitled to the "some evidence" standard of review that we afford disciplinary administrative decisions. The magistrate court properly refused to apply the "some evidence" standard to Pearson's allegedly false and retaliatory accusation.

C. Sufficiency of Claimed Injuries

Pearson argues that Hines' punishment of ten-day confinement and television loss did not constitute an "atypical and significant hardship" as required in *Sandin v. Conner*, 115 S. Ct. 2293, 2300 (1995). In *Sandin*, the Supreme Court determined that the Due Process Clause afforded a prisoner no protected liberty interest where the prisoner claimed prison officials wrongly sentenced him to thirty days segregation in a holding cell. *Sandin*, 115 S. Ct. at 2296, 2302. The Court noted, however, that prisoners

> retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

Id. at 2302 n.11.

[5] Since *Sandin*, this court has reaffirmed that prisoners may still base retaliation claims on harms that would not raise due process concerns. In *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995), a prisoner complained of being double-celled after a long stretch of being single-celled, and claimed that prison officials made the change to retaliate for his agreement to participate in a television interview. This court noted that the prisoner had no constitutionally protected liberty interest in being held in a given facility, but that the *Rizzo* line of retaliation cases survives *Sandin*. *Pratt*, 65 F.3d at 806-07. *Pratt* then concluded that "it would be illegal for [prison] officials to transfer and double-cell Pratt solely in retaliation for his exercise of protected First Amendment rights." *Id.* at 807.

[6] Hines has alleged Pearson's false charge infringed his First Amendment right to file prison grievances. The allegation here falls squarely within *Sandin*'s eleventh footnote and *Pratt*'s reasoning; the injury asserted is the retaliatory accusation's chilling effect on Hines' First Amendment rights, not the additional confinement or the deprivation of the television. We hold that Hines' failure to demonstrate a more substantial injury does not nullify his retaliation claim. *Cf. Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (holding that although teacher had no entitlement to employment contract renewal, the college administration's nonrenewal based on the teacher's public criticism of the college is actionable as a violation of the teacher's free speech rights).

II. Hines' Cross-Appeal

Szmaciarz

Hines' cross-appeal requires us to determine whether the trial court erred by applying the "some

evidence" standard of review to Szmaciarz. Hines contends the standard does not apply where the disciplinary charge itself, not the punishment, is contested. Obviously, the deferential standard would never apply if prisoners could simply fashion their complaint to allege retaliation based on the disciplinary charge instead of the punishment. In any event, as discussed above, *Hill* regards the degree of deference to afford a prison factfinder's guilt determination; because that determination necessarily considers the merits of the charge, we find Hines' argument unpersuasive. In accord with our earlier decision in *Barnett*, 31 F.3d at 815-16, we apply the "some evidence" deferential standard of Hill to the findings of the disciplinary board in the present case.[3]

CONCLUSION

In sum, we find that substantial evidence supports the jury's verdict that Pearson charged Hines in retaliation for Hines' use of the prison grievance process. The trial court's refusal to apply the "some evidence" standard of review to Pearson was not error. Nor was it error to apply the standard to Szmaciarz. We also determine that Hines' retaliation claim requires no more substantial injury than alleged.

Accordingly, we affirm the judgment.

---

3. The Second Circuit in *Graham v. Henderson*, 89 F.3d 75 (2d Cir. 1996), found that the *Hill* "some evidence" test was inapplicable where the prisoner claimed that the Board's decision was based on retaliation for the exercise of the prisoner's First Amendment rights. Ninth Circuit precedent in *Barnett*, however, controls our decision and we accordingly adhere to it.

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION

[Filed April 23, 1997]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY DALE HINES, Plaintiff-Appellees- Cross-Appellant, v. JAMES GOMEZ, Director, Defendant, and S. PEARSON, Defendant-Appellant- Cross-Appellee.	No. 95-17259 No. 95-17260 D.C. No. CV-92-00120-WDB ORDER

Before: LAY,* GOODWIN and SCHROEDER, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banch is rejected.

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* The Honorable Donald P. Lay, Circuit Judge for the Eighth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 97-144

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STEVE PEARSON,

Petitioner,

v.

GARY DALE HINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MARTIN H. KRESSE
(Counsel of Record)
McKENNA & CUNEO, LLP
Steuart Street Tower,
27th Floor
One Market
San Francisco, CA 94105
(415) 267-4000

DIANE J. MASON
PHILLIPS & SPALLAS, LLP
225 Bush Street
16th Floor
San Francisco, CA 94104
(415) 439-8870

Attorneys for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

QUESTIONS PRESENTED

1. Should this Court adopt a new standard in First Amendment retaliation cases, contrary to precedent, when there is no conflict between the circuits over the applicable standards?

2. Is the due process "some evidence" standard applicable in reviewing the conduct of an officer who issues a false and retaliatory disciplinary charge?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Gary Dale Hines respectfully requests that this Court deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Ninth Circuit's decision in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I (excerpt)

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For

the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent, Gary Dale Hines, a prison inmate, brought this action alleging that Petitioner, Steve Pearson, a correctional officer, retaliated against him for exercising his First Amendment rights by issuing a false rules violation report against Respondent. Petitioner was found by a jury to have knowingly falsely accused Respondent in a Rules Violation Report, and that Petitioner's motive for doing so was to retaliate against Respondent for his use of the prison grievance system. The jury further found that Petitioner's conduct did not advance any legitimate penological goals.

The trial judge below denied Petitioner's post-trial motion for judgment as a matter of law and motion for new trial. The court of appeals affirmed the trial judge's findings. *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

II. THE JUDGMENT BELOW FALLS SQUARELY WITHIN GUIDELINES SET OUT IN U.S. SUPREME COURT CASES GOVERNING PRISONER CIVIL RIGHTS

Hines' claim that Pearson's false rules violation report was filed in retaliation of Hines' prior use of the prison grievance system is one of the limited First Amendment rights retained by prisoners. It is well established that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Included in those rights is a prisoner's right to petition the government for redress of grievances. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). This right was recently reaffirmed when this Court recognized that prisoners retain "protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available."

Sandin v. Conner, 132 L. Ed. 2d 418, 432 n.11 (1995). *Cf. Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) ("It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts.").

All of the circuits have recognized a prisoner's right to bring First Amendment retaliation claims. *See McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979); *Graham v. Henderson*, 89 F.3d 75 (2d Cir. 1996); *Burkett v. Love*, 89 F.3d 135 (3d Cir. 1996); *United States v. Stotts*, 925 F.2d 83 (4th Cir. 1991); *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 800, 133 L. Ed. 2d 747 (1995); *Ward v. Dyke*, 58 F.3d 271 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 524, 133 L. Ed. 2d 431 (1995); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995); *Smith v. Maschner*, 899 F.2d 940 (10th Cir. 1990); *Harris v. Ostrout*, 65 F.3d 912 (11th Cir. 1995); *Crawford-El v. Britton*, 951 F.2d 1314, 1318 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 62, 121 L. Ed. 2d 29 (1991).

D. PRISONERS MUST MEET A HIGH BURDEN TO PROCEED WITH RETALIATION CASES

Petitioner's contention that "[t]he Hines decision stands as a roadmap for state prisoners who seek to avoid the standards and competing interests that apply in challenges to the prison disciplinary process" is without merit. Pet. 5. In *Pratt v. Rowland*, the Ninth Circuit reexamined its prisoner retaliation law in light of the guidelines set forth in *Turner v. Safley* and *Sandin v. Conner*. In *Pratt*, the court recognized that while retaliation cases "fall within the other protection[s] from arbitrary state action," courts need to "afford appropriate deference and flexibility to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Pratt v. Rowland*, 65 F.3d at 807 (citing *Sandin v. Conner*, 132 L. Ed. 2d 418 (1995)) (internal quotations omitted). Under these guidelines prisoners must meet the high burden of proving 1) that a prison official's allegedly retaliatory actions were motivated by the inmate's protected conduct, and 2) that the retaliatory action advanced no legitimate penological interest. *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (citing *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994)); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (citing *Pratt v.*

Rowland, 65 F.3d 802 (9th Cir. 1995)). This is basically the same analysis used in *Mount Healthy City School Board of Education v. Doyle*, 429 U.S. 274 (1977), in which this Court established that in a § 1983 claim that a state actor retaliated against a plaintiff for exercising a constitutional right, the plaintiff has the initial burden of showing that his constitutionally protected conduct was a motivating factor in the defendant's retaliatory conduct, at which point the burden shifts to the defendant to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. *See Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).

Respondent has met this two pronged hurdle of motive and legitimate penological goals since the beginning of this action. It was applied in Petitioner's motion for summary judgment. *See Hines v. Gomez*, 853 F. Supp. 329 (N.D. Cal. 1994) ("The defendants' motion purported to challenge plaintiff's evidence of retaliatory motive; however, as plaintiff noted in his opposition, defendants did not submit evidence which was properly authenticated and therefore admissible under Federal Rule of Civil Procedure 56(e)." *Hines v. Gomez*, 853 F. Supp. at 330 n.3; and "Moreover, defendants did not attempt to establish by a preponderance of

the evidence that the allegedly retaliatory acts would have occurred regardless of plaintiff's inmate appeals." *Hines v. Gomez*, 853 F. Supp. at 332 n.9.) This test was part of the instructions given to the jury. RT 559:3-18. Finally, the court of appeals applied this test in their review of the case. *See Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) ("Hines' retaliation claim must rest on proof that Pearson filed the disciplinary action against him in retaliation for Hines' exercise of his constitutional rights and that the retaliatory action advanced no legitimate penological interest.").

Petitioner's assertion that "[t]he constitutional balance struck by this Court in assessing prisoner First Amendment claims . . . is skewed when the claim bears the label of retaliation" is incorrect. Pet. 5 (citations omitted). The Ninth Circuit has incorporated this Court's concerns regarding the institutional interests of prisons in its prisoner retaliation cases by reviewing whether there are any legitimate penological goals behind prison officials' allegedly unconstitutional conduct. No conflict with Supreme Court precedent exists and certiorari is not appropriate. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or

the misapplication of a properly stated rule of law.").

B. PETITIONER'S PROPOSAL THAT ONLY SIGNIFICANT DEPRIVATIONS MAY FORM THE BASIS FOR A RETALIATION CLAIM PRESENTS NO QUESTION FOR REVIEW

Petitioner's request that this Court establish a rule that only significant deprivations may form the basis for a retaliation claim does not present a substantial question of law for review as there is no disagreement on the injury requirement in prisoner retaliation cases. It is a settled doctrine of law that the injury asserted in a First Amendment retaliation case is the retaliatory action's chilling effect on a prisoner's First Amendment rights. *See Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989) ("Because state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment, all that [plaintiff's] complaint needs so as to avoid dismissal are allegations that [defendant's] conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights." (internal cites omitted)); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (retaliatory action complained of by prisoner does not have to independently violate the

Constitution); *ACLU of Maryland v. Wimico County Md.*, 999 F.2d 780, 785 (4th Cir. 1993) (retaliation is actionable because it may tend to chill an individual's exercise of constitutional rights).

The Ninth Circuit's holdings regarding the injury inherent in First Amendment retaliation claims do not conflict with the holdings of the Fourth, Eighth, and District of Columbia circuits as asserted by Petitioner. Pet. 7. In *ACLU of Maryland v. Wimico County Maryland*, the court held that the plaintiffs failed to prove any injury as the prison officials actions "may have inconvenienced Appellees, but it did not chill, impair, or deny their exercise of First Amendment rights." *ACLU of Maryland v. Wimico County Md.*, 999 F.2d at 786 (emphasis added).

The Eight Circuit's stance that a claim for retaliation fails "when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform," *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990), is simply another way of saying that there were legitimate penological reasons for the conduct alleged to be retaliatory. Contrary to Petitioner's interpretation of Eighth Circuit retaliation law, the Eighth Circuit has held that "[b]ecause

the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself," and "when retaliatory conduct is involved, there is no independent injury requirement." *Dixon v. Brown*, 38 F.3d 379, 380 (8th Cir. 1994).

In *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996), the standard approved by the District of Columbia Circuit in evaluating whether an injury was asserted in a retaliation case was "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Id.* at 826 (internal quotations omitted). Petitioner has failed to cite any case where the injury required in a First Amendment retaliation claim is more than the chilling effect on a prisoner's First Amendment rights.

Moreover, the authorities cited by Petitioner as examples of the dangers of current retaliation law in fact prove that courts are applying "the constitutional balance struck by this Court." Pet. 5. In *Wiideman v. Angelone*, 848 F. Supp. 136 (D. Nev. 1994), the court recognized that the seizure of the typewriter was "reasonably related to a

legitimate penological interest" and granted summary judgment against the inmate. *Wiideman v. Angelone*, 848 F. Supp. at 140. Likewise, in *Rodriguez v. Kincheloe*, 763 F. Supp. 463 (E.D. Wash. 1991), the court found that the inmate failed to prove that the defendants' actions were not supported by legitimate penological goals and dismissed the retaliation claim. *Rodriguez v. Kincheloe*, 763 F. Supp. at 472.

Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987), involved an inmate's First Amendment right to the free exercise of his religious beliefs. While the *Kent* court remanded the case back to the district court, the court recognized that prison officials' legitimate penological objectives must be recognized. *Id.* at 1225. Sixth Circuit retaliation cases since *Turner v. Safley* emphasize that prison officials' conduct is permissible where it serves a legitimate penological purpose. *See Ward v. Dyke*, 58 F.3d 271, 275 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 524, 133 L. Ed. 2d 431 (1995).

Hall v. Sutton, 755 F.2d 786 (11th Cir. 1985), predates *Turner v. Safley*, 482 U.S. 78 (1987). Eleventh Circuit retaliation law subsequent to *Turner v. Safley* has

held that a prisoner's limited right of access to the courts may not be burdened with practices that are not reasonably related to legitimate penological purposes. *See Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995).

DeGuiseppe v. Village of Bellwood, 68 F.3d 187 (7th Cir. 1995), is not relevant as it involves an action brought by policemen against a village and its police chief. In fact, the Seventh Circuit recognizes that courts "should afford appropriate deference and flexibility to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (citing *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995) (internal quotations omitted).

Petitioner's emphasis on the punishment received by Hines as a result of Petitioner's false and retaliatory disciplinary charge is a crude attempt to shift this Court's focus away from the central issues involved in this retaliation case, which are 1) was Petitioner's conduct in filing a false rules violation report improperly motivated by Respondent's exercise of his First Amendment rights, and 2) if so, whether there is any legitimate penological interest in Petitioner's filing of a false rules violation report. The court of appeals

below applied the standards in a prisoner retaliation suit which "afford appropriate deference and flexibility to prison officials." The Ninth Circuit's holding in this case does not conflict with the holdings of any other circuit. Certiorari is therefore not appropriate in this case. Sup. Ct. R. 10(a).

C. PETITIONER FAILED TO RAISE THE ISSUE OF SIGNIFICANT DEPRIVATIONS IN THE COURTS BELOW

Not only is Petitioner's request that this Court establish a rule that only significant deprivations may form the basis for a retaliation claim without merit, but it should be waived as Petitioner failed to raise this issue in the courts below. The subject of whether the punishment received by Respondent, as a result of Petitioner's false and retaliatory disciplinary charge, is a significant deprivation or merely an "everyday hardship incident to prison life" was not raised in Petitioner's motion for summary judgment. *See Hines v. Gomez*, 853 F. Supp. 329 (N.D. Cal. 1994) ("The defendants' motion for summary judgment relied primarily on one legal theory: that plaintiff's claim of retaliation must fail because the filing of inmate appeals is not constitutionally protected

activity . . . ." *Id.* at 330; and "The court notes that defendants focused on whether the *subject* of the inmate appeal was of constitutional significance." *Id.* at 331 n.4. (emphasis in original)). Similarly, the issue was not raised at all in Petitioner's motion for judgment as a matter of law or for new trial. Petitioner raised the issue of whether the punishment received by Hines constituted an atypical and significant hardship as required in Due Process causes of action for the first time with the court of appeals. Petitioner's argument is not properly before this Court.

II. THERE IS NO SIGNIFICANT CONFLICT OVER APPLICATION OF THE "SOME EVIDENCE" STANDARD AMONG THE CIRCUITS

In *Superintendent v. Hill*, 472 U.S. 445 (1985), this Court held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits." *Superintendent v. Hill*, 472 U.S. at 455. The court of appeals below noted that in *Hill*, this Court considered the due process protections available when a prison board makes a disciplinary decision before it applied the "some evidence

standard." *Hines v. Gomez*, 108 F.3d at 268. In deciding that the deferential "some evidence" standard should not apply to review a prison guard's allegedly false and retaliatory rules violation accusation, the court below focused on the absence of procedural safeguards protecting a prisoner from false retaliatory accusations. *Id. Cf. Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) (in rejecting the application of the "some evidence" standard in a claim of retaliation against a prisoner for pursuing a grievance, the court noted that the protected right of redress is "substantive rather than procedural and therefore cannot be obstructed, regardless of the procedural means applied" (internal citations omitted)).

Cases cited by Petitioner do not support his position that there is a conflict between the circuits in applying the "some evidence" standard. In *McKinney v. Meese*, 831 F.2d 728 (7th Cir. 1987), the prisoner alleged that "he was disciplined in retaliation for the acts of another inmate and that this violates the applicable administrative regulations and due process." *Id.* at 733. The *McKinney* case is not applicable to because 1) there are no claims of First Amendment retaliation, and 2) the prisoner was claiming a violation of his due process rights. *See Black v. Lane*, 22

F.3d 1395, 1402 n.11 (7th Cir. 1994). In a First Amendment retaliation case, the Seventh Circuit has explicitly limited the "some evidence" standard to evaluating due process claims. *See Black v. Lane*, 22 F.3d at 1402.

The current application of the "some evidence" standard in Eighth Circuit prisoner retaliation cases stems from *Orebaugh v. Caspari*, 910 F.2d 526 (8th Cir. 1990)[1]. In *Orebaugh*, the court noted, applying the "some evidence" standard, that the prisoner admitted to performing the acts he was disciplined for and held "[w]hile a prisoner can state a claim of retaliation by alleging that disciplinary actions were based on false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform." *Id.* at 528. This is simply a restatement of the principle that a retaliation claim fails if there are any legitimate penological goals behind the prison officials' allegedly unconstitutional conduct. The Eighth Circuit recognizes that the filing of a false disciplinary charge is actionable if done in retaliation for an

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[1] It is interesting to note that the unanimous Ninth Circuit opinion in *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), was written by the Honorable Donald P. Lay, Circuit Judge for the Eight Circuit, sitting by designation.

inmate's filing of a grievance. *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994).

In examining whether there are any legitimate penological goals behind a prison official's action, the courts are showing "appropriate deference and flexibility to state officials trying to manage a volatile environment, especially with regard to the fine tuning of the ordinary incidents of prison life." *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995) (citing *Sandin v. Conner*, 132 L. Ed. 2d 418 (1995)) (internal quotations omitted). There are no legitimate penological objectives to filing a false and retaliatory rules violation report. The court of appeals below applied the appropriate standards in evaluating Respondent's First Amendment claim.

III. THIS CASE DOES NOT PRESENT SIMILAR QUESTIONS TO THOSE BEFORE THE COURT IN *CRAWFORD-EL v. BRITTON*

While *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996), *cert. granted*, 138 L. Ed. 2d 210 (1997) involves an inmate's claim that a correctional officer retaliated against him in violation of his First Amendment rights, this Court's

decision in *Crawford-El* would not warrant reconsideration of *Hines* by the Ninth Circuit. The *Crawford-El* court determined that the inmate's retaliation claim was a viable cause of action after examining this Court's recent prison rights cases. *Crawford-El v. Britton*, 93 F.3d at 826. The *Crawford-El* court then remanded the case back down to the district court to determine whether the inmate had presented evidence of the correctional officer's impermissible motive sufficient to survive summary judgment. *Id.* at 829. The questions presented in the Petition for a Writ of Certiorari in *Crawford-El v. Britton* deal with issues of qualified immunity. *See Crawford-El v. Britton* Petition for a Writ of Certiorari, p. i. There are no issues of qualified immunity raised in *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997).

CONCLUSION

Petitioner presents no unsettled issues of law for this Court's review. The Ninth Circuit Court of Appeals decision in *Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) followed well established precedents of this Court. Certiorari is not appropriate here.

Respectfully submitted,

Martin H. Kresse
(Counsel of Record)
McKenna & Cuneo, LLP
Steuart Street Tower, 27th Floor
One Market
San Francisco, California 94105
Tel. (415) 267-4000

Diane J. Mason
Phillips & Spallas, LLP
225 Bush Street, 16th Floor
San Francisco, California 94104
Tel. (415) 439-8870

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